IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.202 OF 2005

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Vikram Builders
and ors. ...Petitioners

v/s.

S.M.Samant & ors. ...Respondents

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Mr.A.Y. Bookwala i/b Mr.S.K. Jain for the Petitioners.
Mr.S.S. Purohit i/b Purohit & Co. for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 29TH NOVEMBER,2005

P.C.:

1. By this petition the Petitioners challenge the award made by the arbitral tribunal of the Bombay Stock Exchange dated 23-12-2003.

2. Few facts which are necessary for deciding this petition that the Petitioner No.1 admittedly was the client of the Respondents/stock brokers. The Petitioners moved before the arbitral tribunal claiming that they had purchased certain shares through the Respondents. After purchasing those shares they lodged them with the company for transfer of those shares in their names. The company refused to transfer the shares in favour of the Petitioners, because signatures on the transfer-deeds were not talling. The Petitioners, therefore, were claiming price of those shares. The Petitioners were also claiming certain amounts from the Respondents on the allegation that through the Respondents the Petitioners had sold certain shares, but the Respondents were not paying the sale price of those shares to the Petitioners. It is an admitted

position that, thereafter, the Respondents issued some cheques for making payment to the Petitioners as sale price of the shares. Those cheques were dishonoured. Therefore, a civil suit was filed in this court. There a settlement has been reached. As a consequence the Petitioners were paid by the Respondents the sale price of the shares. Therefore, that chapter of the matter before the arbitrator was closed. The only issue that remained before the arbitrator was whether the Petitioners were entitled to the price of the shares which according to the Petitioners were purchased by them through the Respondents and which came back as bad delivery to the Petitioners. The Respondents had filed a counter claim before the arbitration alleging that these shares were never actually purchased by the Petitioners through the Respondents. That these shares along with transfer-deeds were stolen by the Petitioners from the Respondents and therefore the Respondents claimed delivery of those shares from the Petitioners. Admitted position is that both the parties did not lead any oral evidence before the arbitral tribunal. The arbitral tribunal, on the basis of the documentary evidence before it, came to be conclusion that the Petitioners have not been able

to prove that they have purchased the shares through the Respondents and therefore held that the Petitioners are not entitled to any award in their favour from the arbitral tribunal. So far as counter claim is concerned, the arbitral tribunal came to the conclusion that the counter claim deserves to be allowed because the Petitioners have not been able to prove that they have purchased the shares. The arbitral tribunal on finding that the transaction in the shares is a very old transaction directed the Petitioners to pay an amount of Rs.8,15,123/- as price of the shares to the Respondents, which according to the Respondents were stolen by the Petitioners from the Respondents.

3. Before me, the learned Counsel appearing for the Petitioners challenged only that part of the award by which the arbitral tribunal has allowed the counter claim made by the Respondents. The submission of the learned Counsel appearing for the Petitioners is that the counter claim made by the Respondents was based solely on the allegation that the shares were stolen by the Petitioners. According to the Respondents, therefore, the arbitral tribunal did not have the jurisdiction to entertain the counter claim, because

the arbitral tribunal of the Stock Exchange gets the jurisdiction only in relation to the transactions which are conducted under the bye-laws of the stock exchange. The arbitral tribunal will not get the jurisdiction to arbitrate in relation to a claim which is the result of theft and not in relation to a transaction on the stock exchange. The learned counsel further submits that even assuming that the learned arbitrator has the jurisdiction to entertain the counter claim, for awarding the counter claim in favour of the Respondents, it is necessary for the arbitral tribunal to hold that these shares are stolen by the Respondents. Finding of theft of the shares could not have been recorded by the arbitral tribunal in the absence of oral evidence led by the Respondents. It is further submitted that the arbitral tribunal has recorded a finding that the shares were stolen by the Respondents from the Petitioners, only because they have found that the Petitioners have not been able to prove that they have purchased the shares through the Respondents. According to the learned Counsel for the Petitioners, from the finding that the Petitioners have not been able to prove that they have purchased these shares through the Respondents, an inference can not be

drawn that the Petitioners have stolen the shares. According to the learned Counsel several other inferences are possible from the finding that the Petitioners have not been able to prove that they have purchased the shares through the Respondents.

4. The learned Counsel appearing for the Respondents, on the other hand, submits that objection to the jurisdiction of the arbitral tribunal to entertain the counter claim was not raised before the arbitral tribunal and therefore that ground cannot be raised in this petition. The learned Counsel further submits that even assuming that that ground can be raised, as the counter claim arose out of the claim made by the Petitioners, the arbitral tribunal will get the jurisdiction to entertain the counter claim. The learned Counsel further submits that as it was the case of the Petitioners themselves that they have purchased the shares from the Respondents, the moment the arbitral tribunal finds that the Petitioners have failed to prove that they have purchased the shares from the Respondents, the only inference possible is that the shares were stolen by the Petitioners from the Respondents and therefore, according to the learned

Counsel the arbitral tribunal was justified in recording that finding.

5. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the foundation of the counter claim of the Respondents was that the shares were forcibly taken by the Petitioners from the Respondents. It was necessary for establishing the counter claim made by the Respondents that the shares were taken away by the Petitioners by applying force, unless the Petitioners admit that they applied force for taking away the shares. The only method by which this could have been proved is by leading oral and documentary evidence. Admittedly no oral evidence has been led. I have not been pointed out any document on record which will conclusively establish that the Petitioners applied force in taking away the shares. In my opinion, therefore, the arbitral tribunal could not have recorded the finding that the shares were taken away by applying force by the Petitioners from the Respondents and without recording such a finding it was not possible for the arbitral tribunal to make any award in favour of the Respondents against the counter claim. Merely because the Petitioners failed

to prove that that they have purchased the shares from the Respondents, it cannot be inferred that the Respondents are the owner of the shares. Failure of the Petitioners to prove that they have purchased the shares through the Respondents disentitles the Petitioners to a direction against the Respondents to pay the price of the shares to the Petitioners. But for making the Respondents entitled to the custody, possession or price of those shares, the Respondents will have to prove independently that either they are the owners of the shares or that the shares were in their lawful custody and that by applying force the Petitioners took away the shares. In my opinion, the learned arbitral tribunal has committed a grave error in inferring that the Respondents are entitled to the price of the shares merely because the Petitioners failed to prove that they have purchased the shares from the Respondents. It is further to be seen that the basis of the counter claim of the Respondents was the alleged act of theft or of taking away the shares applying force by the Petitioners or snatching the shares. Because the counter claim of the Respondents was not based on any transaction which was subject to the bye-laws of the stock-exchange , in my opinion, the arbitral tribunal had no jurisdiction to

entertain the counter claim. This is the petition filed under Section 30 of the Arbitration Act, 1940. Therefore, the court gets jurisdiction to set aside the award which the court finds has an error apparent on its face, and therefore, in my opinion, the Petitioners would be entitled to raise the ground in the petition. The award is, therefore, liable to be set aside, because the arbitral tribunal which made the award had no jurisdiction to make the award.

6. For all these reasons, therefore, in my opinion, the award made by the arbitral tribunal which is impugned in this petition is liable to be set aside.

7. In the result, therefore, the petition succeeds and is allowed. The award impugned in the petition is set aside. The Respondents are directed to pay costs of this petition to the Petitioners, as incurred by the Petitioners.

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